allegations that they had never appointed the plaintiffs to deal with the matters.

In this connection, my view was that a trial was quite unnecessary on the question of liability but damages, also in the light of the correspondence, need to be assessed. Accordingly, I had allowed the plaintiff's appeal with costs on liability and ordered judgment in favour of the plaintiffs. However, as for quantum, I had directed that damages are to be assessed by the learned Senior Assistant Registrar on a date to be fixed.

CITIBANK N.A.

v.

CHOONG KOK MIN AND ABDUL GHAFAR BIN BABA & 4 ORS. (THIRD PARTIES)

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. D2-22-867-90]
6 OCTOBER 1992

PRACTICE AND PROCEDURE: Application for summary judgment - Final judgment entered against defendant before SAR - Appeal - Whether triable issues raised.

The plaintiff as a member of a consortium of bankers and financial institutions, extended term loans and banking facilities to a company called India-Malaysia Textiles Bhd. (the borrower).

On 14 January 1984, the plaintiff assigned all its rights, title and interest in all the secured and unsecured debts due and payable by the borrower to the assignee in return for a consideration of RM13.7 million. A joint and irrevocable guarantee dated 14 April 1984 was executed by 4 guarantors, including the defendant, whereby they agreed to indemnify the plaintiff for all loss suffered in the event of default of the assignee in failing to fulfill its obligations under the deed of assignment.

The assignee failed to pay the balance consideration and the plaintiff brought proceedings to enforce the guarantee against the defendant.

The defendant appealed against the decision of the SAR granting leave to enter final judgment and raised three issues in an attempt to set aside the summary judgment:

(1) Whether there was good consideration given for the guarantee.
(2) Whether it is equitable to proceed against one guarantor.
(3) Whether the assignment is enforceable.

Held:

[1] There was a prior arrangement that the guarantee was to be executed after the execution of the assignment and it could not be said that the consideration was past purely based on the time when the guarantee was executed.

[2] The principal debtor is the assignee and at the time the guarantee was executed, the benefit still accrued to the assignee. Since the lapse of time had been agreed to by all the parties, there

is no question of the consideration being a past consideration.

[3] The fact that the plaintiff had sued the defendant but not his other two solvent co-guarantors was nothing more than a preference which the plaintiff, as a creditor, was entitled to. There was no evidence of *mala fide* on the part of the plaintiff.

[4] Lack of authority to sign the assignment had no relevance to the liability of the defendant, as he was being sued under the guarantee he executed and not under the assignment.

[Defendant's appeal dismissed with costs].

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Contracts Act 1950, s. 80

For the plaintiff - Maidzuara Mohamed; M/s. Shearn Delamore & Co.
For the defendant - Azhar Azizan; M/s. Allen & Gledhill
For the 5th third party - Zubaidah bte. Tuan Muda; M/s. Nik Saghir Yaacob & Ismail

JUDGMENT

Siti Norma Yaakob J:
The plaintiff in these proceedings is a member of a consortium of bankers and financial institutions that had extended term loans and banking facilities amounting to RM16,144,188.59 to a company called India-Malaysia Textiles Bhd. (the borrower). The plaintiff acted as the trustee for the consortium in respect of these facilities as well as other matters directly related to the loan transactions and for this purpose reference to the plaintiff includes reference to the consortium as well.

On 14 January 1984, the plaintiff assigned all its rights, title and interest in all the secured and unsecured debts due and payable by the borrower to the plaintiff as at 31 July 1983, to a company called Resources Industries (Malaysia) Sdn. Bhd. (the assignee), for a consideration of RM13.7 million. For that purpose, a deed of assignment was executed by the plaintiff, the assignee and the borrower.

Under clause 3.02(b) of the assignment, the balance of the purchase consideration was to be settled by a final payment of RM2 million by the assignee to the plaintiff within a period of two years from the date of the execution of the assignment, that is, on or before 14 January 1986. Pending such payment, the assignee was to secure, *inter alia*, the personal guarantees of the following four named persons:

(1) Bakhtiar bin Tamin
(2) Mohd. Tamrin bin Abdul Ghafar
(3) Abdul Ghafar bin Baba and
(4) Choong Kok Min, the defendant in these proceedings.

A joint and irrevocable guarantee dated 14 April 1984, was executed by all the four persons, whereby they agreed to indemnify the plaintiff for all loss suffered in the event of default of the assignee in failing to fulfill its obligations under clauses 3.02 of the assignment to the amount of RM2 million. Needless to say, the assignee failed to pay the RM2 million by 14 January 1986, and hence the present proceedings by the plaintiff to enforce the guarantee on the defendant, being one of the four guarantors.

Before the Senior Assistant Registrar, the plaintiff succeeded in its application to enter final judgment against the defendant and the instant proceedings before me is the defendant's appeal to have the summary judgment set aside.

Three issues were raised during the appeal, namely:

(1) Whether there was good consideration given for the guarantee.
(2) Whether it is equitable to proceed against one guarantor.
(3) Whether the assignment is enforceable.

The guarantee that was provided by the defendant was not executed contemporaneously with the assignment but executed three months later and because of this, the defendant contends that the consideration for the guarantee is past and, as such, there has been non-compliance of s. 80 of the Contracts Act, 1950. Whether or not there is good consideration given by a guarantor must depend on the facts of each case and the conduct of the parties directly involved in the execution of the guarantee.

In this instance, the guarantee was executed pursuant to clause 5.01(ii) of the assignment, which states that by 14 April 1984, a joint and several guarantee was to be executed by the defendant and the other three co-guarantors. Thus it has already been agreed that there was to be a grace period of three months after the execution of the assignment within which the guarantee was to be executed and the guarantee

was executed within that grace period of time. In view of this prior arrangement, it cannot be said that the consideration is past purely based on the time when the guarantee was executed.

The principal debtor in these proceedings is the assignee and at the time the guarantee was executed, the benefit still accrued to the assignee, even though there is a lapse of three months between the execution of the assignment and the execution of the guarantee. Since the lapse of time has been agreed to by all the parties, there is, therefore, no question of the consideration being a past consideration and to that extent, s. 80 of the Contracts Act 1950, has been sufficiently fulfilled.

It is true that the guarantee is not a continuing guarantee but if there is any doubt as to the relationship of the parties and their liabilities, the recitals in the guarantee are clear in meaning and intent and recital (C) repeats the time frame when the guarantee must be given, by reference to clause 5.01(ii) of the assignment, matters which the defendant cannot now deny were within his knowledge at the time he executed the guarantee. On the facts of this case, I consider there has been good and sufficient consideration given for the guarantee.

Although four persons had signed the guarantee, the plaintiff only singled out the defendant in these proceedings and this has prompted the defendant to maintain that the plaintiff had unfairly placed the whole burden of the debt on him. Bakhtiar Tamin has already been adjudged a bankrupt and that leaves Mohd. Tamrin Ghafar and Abdul Ghafar Baba. Both are well-known personalities, both are members of Parliament, the former is a son of the latter, who is also the Deputy Prime Minister of this country.

The fact that the plaintiff has sued the defendant but not his other two solvent co-guarantors, is nothing more than a preference which the plaintiff, as a creditor, is entitled to do. To say that by doing so, the plaintiff had unfairly placed the whole burden of the debt on to the defendant is to impute some form of *mala fide* on the part of the plaintiff, but there is no evidence of such *mala fide*. The liability under the guarantee is a joint and several one. It is joint when all the four guarantors are equally liable but several when liability can be enforced against an individual guarantor, with the right of the individual guarantor to get contribution from his co-guarantors. This line of action has been taken by the defendant, as he has added his co-guarantors as third parties to these proceedings.

The defendant has also questioned the possibility that the assignment is unenforceable, as no written notice of the assignment as envisaged by s. 4(3) of the Civil Law Act, 1956, has been sent by the plaintiff to the borrower. The only written notice apparent on the assignment is the acknowledgment by a Director of the borrower, who had no authority to act on behalf of the borrower as at that time, the borrower was already under receivership. Only the Receiver and Manager of the borrower could have signed the assignment on behalf of the borrower.

It is clear from clause 1 of the assignment that the borrower had consented to the assignment and consent here presupposes that notification of the assignment to be executed had already been given to the borrower, and in all probability, such notification must have been in writing. In any event, lack of a written notice does not render the assignment illegal or unenforceable, as the assignment then becomes an equitable assignment that binds all the parties to the assignment.

Lack of authority to sign the assignment has no relevance to the liability of the defendant, as he is being sued under the guarantee he executed and not under the assignment.

Since all the issues raised have been sufficiently dealt with by affidavit evidence, I had accordingly dismissed the defendant's appeal with costs.